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NO. 83-144

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

DOUGLAS VINZANT,
Petitioner

v.

ARNOLD KING,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Caroline B. Playter

Edward Berkin

KEHOE, DOYLE, PLAYTER,
NOVICK & STRIMAITIS
Nine Hamilton Place
Boston, MA 02108
(617) 338-0070

Counsel for Respondent

Questions Presented for Review

I. Does the lower court's ruling conflict with the Fourth Circuit's decision in Ward v. Johnson, 667 F.2d 1126 (1981)?

   A. Did the lower court hold that prison wardens must investigate every disciplinary hearing to be certain procedural safeguards were provided or, rather, did it hold that petitioner prison warden had a duty to investigate disciplinary procedures where the warden was notified of the possibility of procedural irregularities?

   B. Did respondent's disciplinary appeal and the reports of the disciplinary board provide notice to petitioner that respondent's constitutional due process rights had been violated?

II. Does the lower court's ruling conflict with decisions of this Court?

   A. Was petitioner's denial of respondent's appeal in light of notice to petitioner of procedural irregularities causally related to the deprivations of respondent's due process rights and the harm suffered by respondent?

B. Did the lower court reject petitioner's good faith immunity defense on the basis of a violation of correction department regulations by members of the board whose actions petitioner reviewed or, rather, did the lower court reject that defense based on its findings that petitioner violated clearly established constitutional rights and knew or should have known that respondent was entitled to them?

C. Did the lower court properly apply the standard discussed in Harlow v. Fitzgerald, ____U.S.____, 102 S.Ct. 2727 (1982) when it first examined and decided whether the law violated by petitioner was clearly established at the time and then examined petitioner's degree of knowledge and found that petitioner failed to prove lack of knowledge.

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Goldberg v. Kelly, 397 U.S. 254 (1970)

Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727 (1982)

King v. Higgins, 370 F. Supp. 1023 (D. Mass. 1974)

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)

Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970)

Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973)

Rizzo v. Goode, 423 U.S. 362 (1976)

Scheuer v. Rhodes, 416 U.S. 232 (1974)

Ward v. Johnson, 667 F.2d 1126 (4th Cir. 1981)

Wolf v. McDonnell, 418 U.S. 539 (1974)

Statement of the Case

Respondent adopts for the most part the statement of the case presented by the petitioner. However, respondent also directs this Court to certain omissions or inaccurate statements contained in petitioner's statement of the case.

Petitioner concedes in his statement of the case that he denied respondent's appeal from the findings and recommendations of the disciplinary board after examining reports of the disciplinary board. However, petitioner incorrectly states that those reports mentioned nothing in regard to the procedure afforded respondent. Later, in the argument section of the petition, petitioner correctly points out that the reports petitioner received from the board members "did not indicate that all of the applicable regulations had been followed." On this matter, the Circuit Court stated:

> The reports of the board members were conspicuous in their silence regarding plaintiff's prior notice of the proceeding and his opportunity to confront the complaining officer and present witnesses on his own behalf. In addition, one of the reports indicated that the board's decision was based in part on a private conversation with the complaining officer.

> Those reports, ..., were sufficient at least to put [petitioner] on notice of the constitutional violations.
>
> Petition, Appendix A at 15-17.

With respect to the relief granted, petitioner neglected to state that in addition to ordering records of respondent's disciplinary and reclassification proceedings expunged, the District Judge ordered respondent to be provided with proper disciplinary and reclassification hearings. Petitioner and his co-defendant appealed only that portion of the District Court's decision that dealt with the reclassification procedure. Before the Circuit Court affirmed the District Court's order requiring a new classification hearing (April 24, 1974), the correction officials conducted a de-novo disciplinary hearing (March 8, 1974). At that hearing, the disciplinary board found respondent not guilty of the most serious offense, inciting to riot; guilty of refusing to obey a direct order; and guilty of refusing to work. (Petition, Appendix E at 3). As a result of the de-novo board's findings, respondent was to be removed from the farm at Concord. The disciplinary board recommended reclassification. The board, however, imposed no isolation time.

Petitioner also neglected to state that the District Court found his co-defendant, acting Commissioner of Corrections Joseph Higgins, not liable for monetary damages because, with respect to Higgins, respondent had produced insufficient evidence that Higgins knew or should have known that departmental disciplinary procedure was not being followed. The District Court also found neither defendant liable for damages flowing from the reclassification hearing, since the law regarding a prisoner's rights at such a hearing was unclear at the time of the incident.

Summary of the Argument

The petition should be denied because the lower court's ruling does not conflict with either the Fourth Circuit's decision in Ward v. Johnson, 667 F.2d 1126 (1981), or applicable decisions of this Court. The lower court's ruling is distinguishable from Ward on the facts. In Ward, the court found that there was not even a scintilla of evidence showing that the prison warden played any part in the denial of plaintiff's due process rights. Here, however, the Magistrate, District Judge, and Circuit, all found that the petitioner received information which alerted or should have alerted him to the fact that respondent's due process rights had been violated.

Petitioner's failure to further investigate the conduct of the disciplinary hearing and his denial of respondent's appeal directly caused harm to respondent. That harm consisted of the deprivations flowing from respondent's placement in solitary confinement and respondent's knowledge that petitioner treated him unfairly.

In judging petitioner's good faith immunity defense the lower court correctly applied the standard discussed in Harlow v. Fitzgerald, ____U.S.____, 102 S.Ct. 2727 (1982). The court properly rejected that defense because it found that the rights violated by petitioner were clearly established and petitioner knew or should have known that respondent was entitled to them.

Reasons for Denying the Writ

The Lower Court's Ruling Does Not Conflict With The Fourth Circuit's Decision In Ward v. Johnson, 667 F.2d 1126 (1981) Or With Applicable Decisions of This Court.

The Writ should not issue because all of petitioner's proposed bases justifying review are totally without merit. This Circuit's decision does not conflict with the Fourth Circuit's decision in Ward v. Johnson, 667 F.2d 1126 (1981). Furthermore, it does not conflict with applicable decisions of this Court.*

To support his claim that the First Circuit's decision "directly conflicts" with the Fourth Circuit's decision in Ward v. Johnson, petitioner blatantly miscontrues the breadth of the holding below. It is not, as petitioner asserts, that prison wardens must investigate every disciplinary hearing to be certain procedural safeguards were provided. The holding, instead, is much narrower. The First Circuit held that where a prisoner raises the issue of procedural irregularities and the reviewing authority then investigates and learns that procedures may, in fact, not have been followed, that authority may be liable for not curing deficiencies.

* Apparently the decisions of this Court with which petitioner claims the First Circuit's decision in this case conflicts are: Rizzo v. Goode, 423 U.S. 362, 370 (1976); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 692 (1978); Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct 2727 (1982); Butz v. Economou, 438 U.S. 478 (1978); and Scheuer v. Rhodes, 416 U.S. 232 (1974).

In Ward, the only statements concerning the issue of the prison warden's liability were:

> He [plaintiff] took an administrative appeal to defendant Johnson [the warden] and the charges against him were ultimately dismissed. Dismissal was not granted, however, until after the punishment had been served.
>
> Id. at 1129.
>
> ...
>
> The record does not even faintly suggest, however, that defendant Johnson played any part in this denial.*
>
> Id. at 1131.

Here, the record compelled the Magistrate, District Judge and Circuit Court to find that petitioner played a significant role in the denial of respondent's right to procedural due process.

Moreover, consideration of Coles v. Levine, 561 F. Supp. 146 (D. Md. 1983), decided subsequent to Ward in the Ward circuit, further illustrates the significant distinctions between the instant case and Ward. In Coles the Court decided that the prison warden was not liable to the prisoner for violation of the prisoner's rights under the Due Process Clause because the warden

---

* The right denied in Ward v. Johnson, 667 F.2d 1126, 1131 (1981), was plaintiff's right to procedural due process of law. The defendant who was found liable was the chairman of the disciplinary board who prohibited plaintiff from calling witnesses in his defense at his disciplinary hearing. Id. at 1130-1131.

> neither knew nor should have known of the procedural error committed by the Adjustment Team.
>
> Id. at 148.

That determination was based on the fact that the warden conducted his review of the Classification Adjustment Team's (CAT) determination on the basis of the CAT's Decision and Recommendation Form and that form provided no notice to the warden of any procedural defects.

In the instant case the lower court considered and totally rejected petitioner's claim that he had no reason to know that respondent's rights had been violated.

> Defendant confuses a lack of knowledge of the failure of other officials to ensure plaintiff's constitutional rights with a lack of duty on his part to assure that the proceedings below were constitutionally sound...
>
> The reports of the board members were conspicuous in their silence regarding plaintiff's prior notice of the proceeding and his opportunity to confront the complaining officer and present witnesses on his own behalf. In addition, one of the reports indicated that the board's decision was based in part on a private conversation with the complaining officer.
>
> Those reports, ..., were sufficient at least to put him [the petitioner] on notice of the constitutional violations.
>
> Petition, Appendix A at 14-16.

In addition to the reports of the disciplinary board, petitioner had some notice of respondent's claim of violations of his procedural rights through respondent's appeal form. As the Magistrate stated:

> In his appeal, plaintiff alleged that the institution was "playing games" and that the hearing was a "Kangaroo Court." (Ex. 2). While these allegations may not be artfully drawn and are doubtlessly not new to a corrections official, they do raise the issue of procedural impropriety.

Petition, Appendix F at 14.

Furthermore, the Circuit Court's ruling that petitioner should have investigated the propriety of the hearing is consistent with Coles. There the Court also held that the warden was charged with reviewing the CAT determinations for, among other things, procedural errors. Ibid.

It is the fact that petitioner had information putting him on notice of procedural deficiencies when he denied respondent's appeal which sets this case on much narrower ground than asserted by petitioner. Respondent agrees with petitioner that once regulations are in effect, a prison official should be able to assume that the regulations are being followed by line officers. (Petition at 11). However, that assumption disintegrates upon a claim that the regulations are not being followed and vanishes upon receipt of information corroborating that claim. Rather than have the far-reaching

impact asserted by petitioner, all this holding will do is alert correction officials to their responsibility to assure compliance with constitutional guarantees and procedural regulations when they have some notice of non-compliance. That is not a bad result, and certainly one contemplated and addressed by this Court in Harlow v. Fitzgerald, _____U.S. _____, 102 S.Ct. 2727 (1982).

Petitioner mistates the lower court's holding in three other ways in an effort to heighten the significance of the case. First, petitioner claims that there is no causal connection between the violations of respondent's due process rights and petitioner's actions, and therefore respondent is not entitled to recover damages. As discussed above the petitioner failed to fulfill his responsibility of assuring procedural regularity even though he was on notice that serious defects existed in the process. Moreover, petitioner's act of denying the appeal triggered respondent's placement in solitary confinement. Petitioner directly caused respondent to suffer the physical, mental and emotional consequences of solitary

confinement as well as the distress which followed from respondent's well-formed belief that the government treated him unfairly.* Carey v. Piphus, 435 U.S. 247, 261-262 (1978).

Second, petitioner claims that the Circuit Court rejected petitioner's good faith immunity defense solely on the basis of a violation of correction department regulations by members of the board whose actions petitioner reviewed. That was not the basis of the decision. Instead, the Court initially found that the rights violated by petitioner were clearly established and that petitioner knew or should have known that respondent was entitled to them.

> It has long been settled that "whenever substantial individual interests of prisoners are at stake, 'some assurances of elemental fairness are essential.'" Palmigiano v. Baxter, 487 F.2d 1280, 1283 (1st Cir. 1973) (quoting Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970)).
>
> Petition, Appendix A at 8.

* In this action's original District Court opinion on the injunctive and declaratory relief claims the District Judge stated:

> The inmate is not the sole beneficiary of these Constitutional guarantees. The public itself has a vital interest and stake in the rehabilitation of prisoners. As a practical matter, rehabilitation is nothing more than a determination by a prisoner to live within our system of law and order. While confined, his only exposure to such a system is that supervised by prison officials. The chances of rehabilitation improve markedly when prisoners become aware and convinced that the system is fair and that it works. Absent such awareness and conviction, the prospects for rehabilitation are painfully obvious.
>
> Petition, Appendix H at 25-26.

In full recognition that the precise bounds of procedural due process were not clear at the time of the violations here, and that Wolf v. McDonnell, 418 U.S. 539 (1974) and Palmigiano v. Baxter, supra, were decided after the hearing in the instant case, the Court nonetheless properly rejected petitioner's claim of immunity.

> In its opinion invalidating plaintiff's hearing, the district court noted the requirements newly enunciated in Palmigiano, but determined that it need not rely on them because "measured against even the most basic standards of due process and fundamental fairness, the disciplinary procedure afforded plaintiff fails to pass constitutional muster." King v. Higgins, supra, 370 F. Supp. at 1028. Plaintiff risked and was punished by a substantial deprivation of liberty. As the district court recognized, it had long been clear that at a hearing which could result in such punishment plaintiff was entitled at least to notice and the opportunity to present evidence in his own behalf. Id. (citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)). We agree with the district court that those safeguards should be considered part of the "assurances of elemental fairness" to which a prisoner is entitled and that needed no specific judicial articulation.
>
> Petition, Appendix A at 9-11.

Petitioner's knowing violation of departmental regulations, as the lower court pointed out, only bolstered its conclusion that petitioner was not entitled to his asserted "good faith" defense. (Petition, Appendix A at 11-13). It was not, as alleged by petitioner, the basis for the Court's decision holding petitioner liable. Since the

lower court clearly premised its denial of immunity on the fact that petitioner violated a clearly established constitutional right, this Court need not even address petitioner's claim that the lower court's action was based solely on petitioner's violation of state regulation.

Finally, the petitioner argues that the lower court's decision was in error because it injected the subjective element of the good faith defense into the evaluation of the claim and therefore ran afoul of Harlow.* (Petition at 16-17). On the contrary, the lower court strictly complied with Harlow. It found the law violated by petitioner to be clearly established at that time and then examined whether petitioner proved his lack of knowledge. Harlow v. Fitzgerald, supra, ____U.S. at ____, 102 S.Ct. at 2739. The lower court applied the appropriate test and therefore focused on the objective legal reasonableness of petitioner's acts. Ibid.

* This claim was directly addressed and rejected by the lower court in its opinion denying petitioner's petition for rehearing. See Petition, Appendix B.

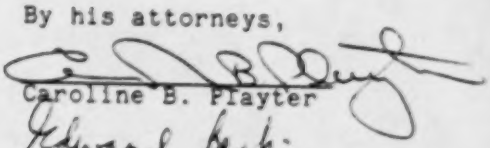
Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

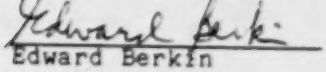
Respectfully submitted:

ARNOLD KING

By his attorneys,



Caroline B. Playter



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ON PETITION FOR WRIT OF CERTIORARI TO THE
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FIRST CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Arnold King, respectfully moves the Court, pursuant to Rule 46 of the Rules of the Supreme Court of the United States, for leave to proceed in forma pauperis. Respondent did seek, ans was granted, leave to proceed in forma pauperis in the district court and continued to proceed in forma pauperis in the First Circuit Court of Appeals, pursuant to Rule 24 of the Federal Rules of Appellate Procedure.

In further support of this motion, respondent attaches hereto his affidavit.

Respectfully submitted:

ARNOLD KING

By his attorney,

Caroline B. Playter
KEHOE, DOYLE, PLAYTER,
NOVICK & STRIMAITIS
Nine Hamilton Place
Boston, MA 02108
(617) 338-0070

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ARNOLD KING,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

AFFIDAVIT OF RESPONDENT, ARNOLD KING,
IN SUPPORT OF MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

I, the above-named affiant, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of opposing the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. I have been incarcerated since the age of 18.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those person. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Arnold King

Arnold King

SUBSCRIBED AND SWORN TO before me this 11 day of October

October, 1983.

Shirley Pennebaker-Paquette

Com Exp 5/2/10